

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

City and County of San Francisco,

Complainant,

vs.

NextG Networks of California, Inc. (U 6754 C)

Defendant.

Case 05-03-010  
(Filed March 9, 2005)

**JOINT RULING AND SCOPING MEMO**

This ruling sets the schedule for the proceeding and determines its scope. This ruling also denies NextG Networks of California, Inc.'s (NextG) motion to dismiss.

**Background**

The City and County of San Francisco (CCSF) claims that NextG is violating the terms of the certificate of public convenience and necessity (CPCN) granted in Decision (D.) 03-01-061, because NextG: 1) has failed to timely exercise its authority to offer competitive local exchange or interexchange services, and 2) is representing to CCSF that it is authorized to provide radio frequency transport services, a service the Commission has not authorized it to provide. CCSF further claims that NextG is violating the terms and conditions of its CPCN because the Commission has not authorized NextG to install either:

1) microcell and antenna facilities in the public rights-of-way, or 2) any equipment or facilities on existing utility poles.

On March 30, 2005, NextG filed a motion for assigned commissioner's ruling dismissing complaint and a motion for expedited consideration of its motion to dismiss. On April 14, 2005, CCSF filed its opposition to the motion to dismiss, its partial opposition to the motion for expedited consideration and a motion to strike evidence submitted in support of the motion to dismiss. On April 19, 2005, NextG filed its reply. The May 20, 2005 administrative law judge's (ALJ) ruling requested further briefing on the motion to dismiss. The parties submitted responses to the ruling on May 27, 2005, and replies on June 9, 2005. A prehearing conference was held on June 13, 2005.

### **Motion to Dismiss**

NextG's motion to dismiss is denied. It is premature to find that there is no violation of law or order upon which the Commission can grant relief.

NextG requests dismissal of the complaint for failure to state a cause of action under Pub. Util. Code § 1702. NextG also alleges that CCSF filed the complaint to preclude NextG from obtaining timely relief in federal court.<sup>1</sup> CCSF alleges NextG is offering services it is not authorized to provide and that it is misrepresenting its authority to CCSF. CCSF further states that there are disputed facts concerning the services offered by NextG, the statements NextG has made to other localities concerning the nature of its services, and CEQA review.

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<sup>1</sup> That allegation is moot; the district court has stayed NextG's complaint pending Commission resolution of this complaint.

In its CPCN application, NextG requested the authority to install its equipment on utility poles. Whether the Commission granted that authority is unclear. The limited facilities-based authority granted to NextG appears to be restricted to construction in existing buildings and structures. Although NextG included a proponent's environmental assessment (PEA) with its application for a CPCN, D.03-01-061 makes no finding on whether there would be an environmental impact from installing microcells and antennas on utility poles. D.03-01-061 provides in relevant part:

Applicant represents that it will not be constructing any facilities other than equipment to be installed in or on existing buildings or structures, for the purpose of providing interexchange or local exchange services. Therefore, it can be seen with certainty that there is no possibility that granting this application will have an adverse effect upon the environment. Applicant must file for additional authority, and submit to any required CEQA review, before it can construct facilities other than equipment to be installed in existing buildings or structures. (D.03-01-061, 2003 Cal. PUC LEXIS 55, \*\*4-5.)

Whether NextG has the authority it requested is in dispute. NextG's limited facilities-based authority may be sufficient to permit NextG to install microcells and antennas on utility poles. (*See* D.01-06-019, 2001 Cal. PUC LEXIS 334, \*1.) NextG's construction activities also may be exempt from Commission review under D.04-04-014, which found installation of optical fiber and related telecommunications equipment on existing utility structures by third party telecommunications providers is categorically exempt from environmental review under CEQA. (D. 04-04-014, 2004 Cal. PUC LEXIS 142, \*1.)

This proceeding will determine what, if any, environmental review is necessary. To assist in that determination, NextG shall file its previously submitted PEA when the parties file the stipulation of facts. NextG, in

addressing whether its proposed construction falls within the categorical exemption for the minor alteration of existing facilities of utilities used to provide utility service, shall also address whether any conditions limit the applicability of that categorical exemption.

NextG's assertion that the complaint also fails to state a cause of action in alleging that NextG has failed to exercise its authority and has misrepresented its authority to CCSF does not demonstrate there is no legal controversy. CCSF intends to present evidence to support its allegations. CCSF and NextG dispute the nature of NextG's authority. Thus, CCSF's complaint does not request an advisory opinion that would narrow or limit the scope of NextG's authority.

#### **Apparent Ex Parte Violation**

On May 12, 2005, NextG sent an e-mail to an advisor of the assigned commissioner. The e-mail contained three attachments with information regarding CCSF's actions on rights-of-way access for traditional wireless carriers. NextG believes the e-mail addresses a different substantive issue than the subject matter of this complaint. Specifically, NextG's e-mail concerns CCSF's denial of right-of-way access to two wireless carriers on the ground that they have merely registered with the Commission. On the other hand, this complaint concerns the scope of authority granted to a certificated carrier. Further, NextG requested prompt disposition of its motion to dismiss, a procedural request. Finally, NextG's attorney apologizes for the appearance of transgressing the Commission's ex parte rules and promises vigilance in the future. NextG recommends filing the materials attached to the e-mail in this proceeding if the Commission deems the communication an improper ex parte. CCSF took no position on this issue.

The e-mail addresses a different, albeit related, substantive issue than the subject matter of the complaint. The ex parte concern arises because the e-mail urged prompt resolution of a pending motion in this complaint proceeding. NextG's commitment to be more vigilant in the future is sufficient.

### **Scope of the Proceeding**

The dispute between the parties centers on four issues:

1. Whether the Commission granted NextG the authority to place antennas and microcells on utility poles and in public rights-of-way in D.03-01-061.
2. Whether NextG misrepresented the authority granted it by the Commission in requesting to place microcells and antennas on utility poles in San Francisco and other localities.
3. Whether NextG timely exercised its authority.
4. Whether the placement of microcells and antennas on utility poles by a telephone corporation such as NextG is exempt from CEQA.

### **Schedule**

The schedule for this proceeding is as follows:

<b>Date</b>	<b>Event</b>
July 11, 2005	Complainant and Defendant file stipulation of facts
July 20, 2005	Concurrent opening briefs filed
July 29, 2005	Concurrent reply briefs filed
....	Draft Decision filed within 60 days

### **Category of Proceeding and Need for Hearing**

This ruling confirms this case as an adjudication, as preliminarily determined in the Instructions to Answer. To facilitate a prompt resolution of this matter, the parties have agreed to prepare a stipulation of facts instead of setting the matter for hearings. Thus, the preliminary determination that a hearing would be scheduled is changed.

### **Designation of Presiding Officer**

ALJ Janice Grau will be the presiding officer.

### **Ex Parte Rules**

Ex parte communications are prohibited in adjudicatory proceedings under Pub. Util. Code § 1701.2(b) and Rule 7 of the Commission's Rules of Practice and Procedure. Although there will be no hearings, this proceeding will address alleged violations of the Commission's rules and regulations. Thus, the prohibition on ex parte communications shall continue to apply.

#### **IT IS RULED** that:

1. NextG Network of California, Inc.'s motion to dismiss is denied.
2. The scope of the proceeding is as set forth herein.
3. The schedule for this proceeding is as set forth herein.
4. The presiding officer will be Administrative Law Judge Grau.
5. This ruling confirms that this proceeding is an adjudication.
6. This ruling changes the preliminary determination that a hearing would be scheduled.
7. Ex parte communications are prohibited.

Dated July 6, 2005, at San Francisco, California.

/s/ GEOFFREY F. BROWN by

PETER G. HANSON

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Geoffrey F. Brown  
Assigned Commissioner

/s/ JANICE L. GRAU

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Janice L. Grau  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

I certify that I have by mail this day served a true copy of the original attached Joint Ruling and Scoping Memo on all parties of record in this proceeding or their attorneys of record.

Dated July 6, 2005, at San Francisco, California.

/s/ ELIZABETH LEWIS  
Elizabeth Lewis

**N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.